UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SEATTLE TIMES COMPANY Employer, and PACIFIC NORTHWEST NEWSPAPER GUILD, COMMUNICATION WORKERS OF AMERICA, LOCAL 37082. Petitioner.	Case 19-RC-261015

PETITIONER'S RESPONSE TO SEATTLE TIMES COMPANY'S MOTION TO IMPOUND BALLOTS

Pacific Northwest Newspaper Guild, Communication Workers of America, Local 37082 (Local 37082 or the Guild) requests that the National Labor Relations Board (NLRB or Board) deny the Seattle Times' (Times) request for extraordinary relief pursuant to 29 C.F.R. § 102.67(j). The Times seeks that the ballots be impounded in the on-going mail-in-ballot election with a ballot count scheduled for September 25, 2020. This case is governed under the 2014 Rules and Regulations because Local 37082's representation petition was filed on May 29, 2020.[1] Under these rules, impoundment of ballots constitutes a form of extraordinary relief and requires "a clear showing that it is necessary under the particular circumstances of the case." 29 C.F.R. § 102.67(2). The Board should deny the Times's motion to impound because the Times cannot clearly show that impoundment is necessary under the particular circumstances of this case because its appeal is without merit and its additional policy arguments cannot meet this high standard for extraordinary relief.

[1]The 2019 rules "are applicable to all petitions filed on or after March 31, 2020." Memorandum GC 20-07 (June 1, 2020).

STATEMENT OF FACTS

Local 37082 has long represented newsroom employees at the Times. DD&E at 2. Local 37082 and the Times (the parties) have entered into many collective bargaining agreements, including the operative agreement here, effective from April 1, 2019 to March 31, 2023 (CBA).

On May 29, 2020, Local 37082 filed a representation petition seeking to represent "[a]ll full-time and regular part-time digital newsroom employees" (digital newsroom or new media employees) in a self-determination or *Armour-Globe* election. On March 31, 2020, the Times filed an unfair labor practice charge (ULP) with Region 19 arguing that Local 37082 was violating the New Media Agreement (NMA) contained in Addendum 12 of the CBA by petitioning for a self-determination election and asked that the election be blocked as a result. On July 1, 2020, the Region denied the Times request to block the election, and ordered a pre-election hearing.

At hearing, the Times argued that the NMA barred the election. Decision and Direction of Election (DD&E) at 4. The NMA, and of particular relevance here, Section D states:

> The Parties further agree the Guild will not use this Agreement, work assignments, or products resulting from this Agreement as a means to attempt to represent or claim jurisdiction over any unaffiliated employee(s) from a non-Guild home department or sub-department *through accretion, unit clarification procedures or contract grievance procedures*. Work assigned or performed pursuant to this cross- jurisdictional Agreement is not intended to enhance or detract from any future *accretion, unit clarification or contract grievance argument* made by the Guild. Once this Agreement ends, nothing in it shall prevent the Guild from seeking *accretion, unit clarification or redress through the contract grievance procedure*. Furthermore, nothing in this Agreement is intended to alter the historical practice of the parties with regard to unit work performed by unaffiliated employees in supervisory or executive positions. The Seattle Times recognizes the National Labor Relations Act, Section 7, rights of employees, including those in unaffiliated departments involved with new products and projects within the scope of the Agreement.

Er. Ex. 1 at 74 (emphasis added).

Examining the language of the NMA, the Regional Director (RD) determined that under the *Briggs Indiana* doctrine, *Briggs Indiana Corp.*, 63 NLRB 1270 (1945), and its progeny, the unambiguous language of the NMA did not bar Local 37082 from holding a self-determination election. DD&E at 5-7; 24-25. The RD explained that "[t]he NMA, on its face, limits the scope of the agreement not to 'attempt to represent or claim jurisdiction' solely to accretion, unit clarification, and grievance procedures. Each of these has clear meaning under the Act, and each is distinct from the self-determination election…." *Id.* at 6.

In a separate motion, the Times requests review of the RD's decision.

ARGUMENT

I. Standard of review.

A party requesting review may also move in writing for one or more of the following forms of relief: "[i]mpoundment and/or segregation of some or all of the ballots." 29 C.F.R. § 102.67 (j)(1)(iii). "Relief will be granted only upon a clear showing that it is necessary under the particular circumstances of the case." 29 C.F.R. § 102.67(2). These motions are very rarely granted. *See* Representation—Case Procedures, 79 FR 74308-01.

II. The Times has not put forth a clear showing that impoundment is necessary given the circumstances of the case because the RD's legal analysis was not flawed.

The Times argues the RD engaged in "scant analysis" and failed to properly analyze whether Local 37082 made an express promise. Seattle Times Company's Motion to Impound Ballots (Mot. to Impound) at 4. However, the RD appropriately analyzed whether Local 37082 made an express promise not to petition for an election under the NMA. DD&E at 3-6; 24. The RD properly focused its analysis on the text of the NMA, which is critical to the *Briggs-Indiana* analysis. DD&E 3-6. Under the *Briggs-Indiana* doctrine, if a union promises not to represent a

group of employees, it will be held to that promise. *Briggs Indiana Corp.*, 63 NLRB at 1271-72 (1945).

> However, this rule will be applied only where the contract itself contains an express promise on the part of the union to refrain from seeking representation of the employees in question or to refrain from accepting them into membership; such a promise will not be implied from a mere unit exclusion, nor will the rule be applied on the basis of an alleged understanding of the parties during contract negotiations.

Cessna Aircraft Co., 123 NLRB 855, 857 (1959); *Lexington Health Care Grp.*, LLC, 328 NLRB 894, 896 (1999) (clarifying *Cessna* to hold that the agreement need not be embodied in the CBA itself, if it is contained in a written agreement).

Looking at the unambiguous text of the CBA, the RD properly found "the Employer's argument that 'attempt to represent' language justifies barring the instant petition unpersuasive, as it clearly ignores the rest of the sentence limiting the restriction to accretion, unit clarification, and contract grievance proceedings." DD&E at 6. The RD then went on to explain that it found the Times's argument that language in another addendum did not "render unclear the otherwise clear language of the NMA." *Id.* And, although the RD did not believe it was necessary to look to the bargaining history to determine whether the CBA contained an express written promise not to petition for an election, the RD noted that "[e]ven assuming *arguendo* that bargaining history of the NMA were relevant inquiry, I find nothing in the bargaining history that undercuts my finding that the Petitioner's express promise is limited to accretion, unit clarification, and contract grievance proceedings, none of which is at issue herein." DD&E at 6. Thus, the RD identified the correct precedent and then properly applied that precedent to the case at bar. *See*

DD&E at 3-6. Thus, the RD's analysis was not flawed and the Times has not met its burden to show that impoundment of ballots is clearly warranted in this case.[2]

III. The Times' policy arguments should be denied because they are unavailing and do not rise to the level of a "clear showing" required by former 29 C.F.R. § 102.67(j)(2).

The Times' raises three policy arguments: (1) the request for review seeks to dismiss the petition, so impoundment is prudent; (2) the group only has 11 voters, jeopardizing the anonymity of ballots; and (3) there is no prejudice if the ballots are impounded, Mot. to Impound at 4-5, but none of these arguments meet the clear showing standard required by former 29 C.F.R. § 102.67(j)(2). First, the facts of this case do not warrant impoundment of ballots because the Timesfailed to show that the RD's decision raises a substantial issue warranting review. *See The Washington Univ. Employer*, 210 L.R.R.M. (BNA) ¶ 1073 (N.L.R.B. Oct. 24, 2017). Second, the Times also argues because there are only 11 employees, the sentiments of the voters would be revealed, but that would only be the case if the vote were unanimous—and in a unanimous vote, no matter the size of the voting group, the sentiment of the voters would be revealed. Third, the Times argues that there is no prejudice if the ballots are impounded, but the Times fails to show why this case is different from every other case where an impoundment of ballots is sought. Thus, the Times failed to meet the clear showing standard, and its request for the impoundment of ballots must be denied.

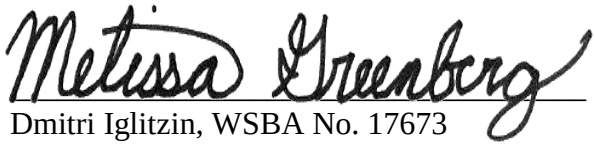
CONCLUSION

This petition is governed by the 2014 Rules and Regulations governing case representation procedures. Thus, the Board is bound by those rules and should decide the case

[2] In its Motion to Impound Ballots, the Times refers the Board to its Request for Review. Mot. to Impound at 4 n. 8. Accordingly, to the extent the Times raises issues in its Request for Review that are not discussed here and the Board believes are relevant, Local 37082 directs the Board to its Response to the Times' Motion for Review.

according to the standard required therein. Here, the Times failed to clearly show that impoundment is necessary.

Respectfully submitted this 9th day of September, 2020.



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DECLARATION OF SERVICE

I, Jennifer Woodward, hereby declare under penalty of perjury that on the date noted below, I filed the foregoing document with the National Labor Relations Board at www.nlrb.gov and emailed at true and correct copy to:

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Signed in Shoreline, WA, this 9th day of September, 2020.

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